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CANADA - FRANCE MARITIME RELATIONS

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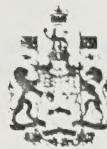
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INTRODUCTION

Maritime relations between Canada and France took a new turn with the signing of an agreement between the two countries in January 1987 as an initial step towards settling their ongoing dispute. This dispute has two facets. On the one hand, there is the nature of France's right to fish in Canadian waters; on the other hand is the question of the maritime boundary between Canada and the French islands of St. Pierre and Miquelon, which are off the southern coast of Newfoundland. With the extension of Canada's jurisdiction to the 200-mile limit, Canada's fisheries relations with France became more complicated. France has historically had access to Canada's fish resources and it has been accorded somewhat more preferential treatment in that area than have other countries. As well as being given a much longer period to phase out fishing in the Gulf of St. Lawrence than were other countries, France retained a perpetual but unspecified right to fish in Canadian waters. Moreover, the presence of that country's two small islands off Newfoundland's coast has led France to claim jurisdiction over a large area within Canada's 200-mile zone. The purpose of this paper is to provide the background to the Canada-France fisheries and maritime boundary dispute and to review recent developments in this area.

BACKGROUND AND ANALYSIS

In 1964, Canada enacted The Territorial Sea and Fishing Zone Act which declared a three-mile territorial sea and a nine-mile exclusive fishing zone off Canadian coasts. The purpose of this was to protect the

fish stocks off Canada's east coast, which were being increasingly subjected to overfishing by foreign nations. The measure followed two United Nations Conferences on the Law of the Sea in 1958 and 1960, both of which had failed to achieve an international consensus on the limits of territorial waters and exclusive economic zones.

As a result of this legislation, negotiations began with countries then fishing in these newly defined Canadian waters. The Canadian laws within the zone were not enforced against those countries with which negotiations were taking place, among which was France. This first round of negotiations dealing with French fishing rights in the Gulf of St. Lawrence was eventually postponed and French fishing in the Gulf continued.

In 1970, Canada amended The Territorial Sea and Fishing Zone Act by increasing Canadian territorial waters to 12 miles and bringing the whole of the Gulf of St. Lawrence under Canadian fisheries jurisdiction. At this point Canada made clear its intention of eventually phasing out all foreign fishing in the Gulf. In 1971, Canada introduced, for the protection of the inshore fishery, a regulation excluding trawlers over 65 feet in length from the sea within the 12-mile territorial limit on the Atlantic coast. As will be discussed later, this affected fishing rights granted to the French under a convention signed in 1904. As a result, a second round of negotiations dealing with French fishing rights in the Gulf began in May 1971. Less than a year later, on 27 March 1972, the Agreement between Canada and France on Their Mutual Fishing Relations was signed.

In retrospect, Canada's unilateral actions such as the extension, in 1970, of its territorial waters at a time when international opinion was becoming more favourable to 100- or even 200-mile exclusive economic zones, as well as the implementation of the 1971 exclusion rule, had the beneficial effect of making the French realize that, without an agreement, they might be "left out in the cold" as international attitudes with respect to the Law of the Sea evolved. This led to the conclusion of the 1972 agreement, the main points of which are reviewed in the following section.



#### A. The 1972 Treaty

The 1972 agreement between Canada and France related to two subjects: a) the maritime boundary between Newfoundland and the French islands of St. Pierre and Miquelon, and b) French fisheries in Canadian waters.

On the question of the maritime boundary, article 8 of the Treaty stated that the line agreed upon "separates Canadian territorial waters (off the southern coast of Newfoundland) from the zones submitted to the fishery jurisdiction of France." The line, which only sets the landward boundary between Canada (Newfoundland) and St. Pierre and Miquelon, is 54 nautical miles long and is based on the principle of equidistance between both coasts.

On the question of French fisheries in Canadian waters, an important aspect of the 1972 Treaty (article 1) was that it superseded "all previous treaty provisions relating to fishing by French nationals off the Atlantic coast of Canada," including the 1904 Convention signed between the United Kingdom and France. This had provided that French citizens could fish on an equal footing with British subjects in the territorial waters along that portion of the coast of Newfoundland between Cape St. John and Cape Ray.

Another important aspect of the 1972 agreement (article 2) was an undertaking by Canada "in the event of a modification of the juridical régime relating to the waters situated beyond the present limits of the territorial seas and fishing zones of Canada on the Atlantic Coast, to recognize the right of French nationals to fish in these waters subject to conservation measures including quotas." In this respect, the French granted reciprocity to Canadian nationals in the waters off the coast of St. Pierre and Miquelon. Thus article 2 granted the French an unspecified but seemingly perpetual right to fish in the 200-mile zone to which Canada extended its jurisdiction in 1977.

Article 3 of the Treaty provided for the French metropolitan registered vessels (MRVs) to fish in the Gulf of St. Lawrence on an equal footing with Canadian vessels until 15 May 1986, after which time the MRVs



would no longer be allowed to fish in these waters. This relatively generous phase-out period (15 years compared to about five years for other countries) resulted from France's unique position which meant that it had to be persuaded to renounce rights guaranteed by previous treaties. On the termination of the phase-out period in 1986, an additional 17,000 tonnes of cod were made available to Canadian Gulf-based fleets in 1987.

Article 4 of the Treaty stated that a maximum of 10 St. Pierre and Miquelon (SPM) trawlers, under 50 metres in length, could continue to fish along the coasts of Newfoundland and Nova Scotia and within the Gulf of St. Lawrence on an equal footing with Canadian vessels, in spite of the phasing out of the MRVs from the Gulf.

Between 1980 and 1986, the Gulf quota allocated to France was 20,500 tonnes of cod, of which France allocated 17,500 tonnes to its metropolitan fleet and about 3,000 tonnes to the SPM trawlers. In 1987, Canada allocated 3,500 tonnes of Gulf cod to SPM trawlers. This allocation was described in an official press release as being in excess of Canada's legal obligations under the 1972 Treaty in order to facilitate the resolution of the Canada-France boundary dispute.<sup>(1)</sup>

The remaining articles of the Treaty dealt with a number of more or less important subjects. Interesting among these was article 6, which stated that: "Canadian fishery regulations shall be applied without discrimination in fact or in law to the French vessels covered by articles 3 and 4, including regulations concerning the dimension of vessels authorized to fish less than twelve miles from the Atlantic Coast of Canada." Again in this respect the French granted reciprocity to Canadian vessels covered by article 4 in SPM coastal waters. With the expiry of article 3, the provisions of article 6 now pertain only to SPM vessels fishing in the Gulf of St. Lawrence.

For the French, the provision of non-discrimination was an important element of the Treaty because it prevented French fishing from being controlled by regulations that were non-discriminatory in law (in

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(1) Government of Canada, News Release, No. NR-HQ-87-13E, 27 January 1987, p. 2.



that they applied to both French and Canadian fishermen) but discriminatory in practice. For example, in 1971, the Canadian government decree that all trawlers over 65 feet in length be excluded from a 12-mile zone off the Atlantic coast had the effect of excluding French trawlers from the 12-mile zone, since all of them were in excess of 65 feet.

Also important was article 10, which established a mechanism for the settlement of disputes arising from the application of the Treaty. This was to be in the form of a commission consisting of two experts, one from each country and both nominated for a period of 10 years, with a third expert to be designated by mutual agreement. Should the Commission, in attempting to resolve a dispute referred to it by either party, not reach a decision satisfactory to both parties, reference was to be made to the third expert, under whose chairmanship the Commission would sit as an arbitral tribunal, the majority decisions of which would be binding on the contracting parties. The dispute mechanism was eventually used in 1985, when France protested the condition attached to a licence which prohibited an SPM factory freezer trawler from filleting fish at sea. As this licensing condition also applied to Canadian trawlers in the Gulf, it therefore fell, in the Canadian view, within the "equal footing" provision of article 4. This view was not accepted by the Tribunal, however, and the dispute was eventually resolved in favour of France.(2)

#### B. The 1987 Agreement

The 24 January Agreement between France and Canada was the result of negotiations that had begun in the previous October to determine: a) the conditions for the application of the 1972 Agreement after 31 December 1986 and b) the process by which the dispute related to the maritime claims of both countries on the waters off the coasts of Canada and St. Pierre and Miquelon should be settled.

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(2) The Arbitral Tribunal Established by Agreement of October 23, 1985 between Canada and France: Dispute concerning filleting within the Gulf of St. Lawrence - award of July 17, 1986.



The 1987 agreement, which can be likened to a memorandum of understanding, provides for the negotiation of agreements on these issues. It establishes deadlines for their conclusion: (a) 30 September 1987 for the determination of the annual quotas for French vessels in Canadian waters (including an unspecified amount of cod from the Northwest Atlantic Fisheries Organization (NAFO) Divisions 2J3KL) for the period 1988 to 1991, and (b) 31 December 1987 for an agreement on third party arbitration of the dispute on the maritime claims of both countries.

An important point is that, although they have different deadlines for negotiations, both agreements will come into force on the same date and each will be contingent upon the other. The implication is that Canada will have to entice the French into binding arbitration of the boundary dispute through sufficient allocations in Canadian waters. It is interesting to note that the current situation is a reversal of that of a number of years ago when the Canadian government was refusing to have the dispute put to an international tribunal. This reversal is probably due to the decision in a similar case, when possession of small islands in close proximity to the coast of France had led Britain to claim a large maritime zone in what the French considered to be their territorial waters. This dispute was eventually settled in favour of France.

The 1987 agreement contains a number of other elements, one of which is the expression of France's protestations against Canada's unilateral establishment of French quotas in Canadian waters for 1987. French allocations in Canadian waters were, for all species, 22,265 tonnes in 1987, down from 37,105 in 1986, a net decrease in allocations to France of 14,840 tonnes. This decrease is somewhat less than the 17,000 tonnes France lost in 1987 as a result of the withdrawal of its metropolitan fleet from the Gulf since in 1987 France was allocated an additional 3,000 tonnes of cod in NAFO Division 2GH. (See the accompanying tables and map for the allocations to France by species and by area in 1986 and 1987.)

Finally, the agreement provided for a joint scientific study on the state of the cod stock in NAFO Division 3Ps, for which the French have set their quota at 26,000 tonnes in 1987. Canada's harvest in this



zone has been stable over several years at the level of approximately 35,000 tonnes, and Canada has established the total allowable catch (TAC) at 41,000 tonnes, of which 6,400 tonnes were allocated to France. The level of harvesting from the combined fishing efforts of both countries fuelled worries that the stock was being subjected to considerable pressure. These fears were allayed, to a certain extent, by the results of the joint scientific study released on 30 June 1987 which suggests that the stock is not in immediate danger, although it is increasing at a lower rate than would be the case were it not being harvested at the current level.

### C. French Claims and Their Potential Impacts

In November 1986, the Government of Canada stated that its inability to negotiate an agreement with France resulted from the nature of the claims put forward by that country. According to a press release by the Department of Fisheries and Oceans, the French are advancing the following demands.(3)

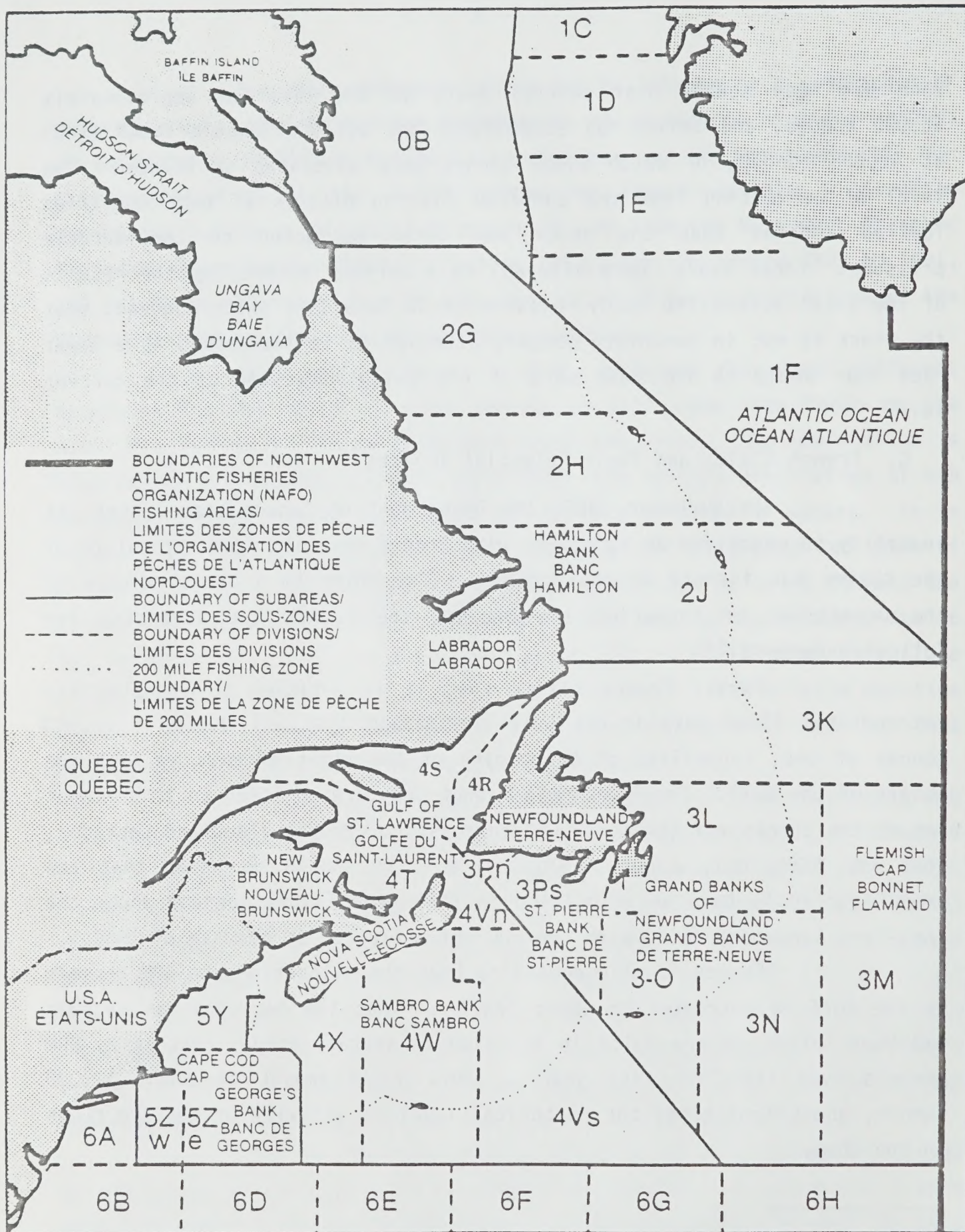
First, France claims that it is entitled to redeploy its metropolitan fleet outside the Gulf and retain its Gulf quota of 17,500 tonnes of cod, regardless of the expiry of the right of MRVs to fish the waters of the Gulf. The French claim that they are entitled to this amount out of the stocks off the northeastern coasts of Newfoundland and Labrador, that is, 2J3KL cod, a non-surplus stock. It should be noted that the French currently have an allocation in this area (1,545 tonnes) under the Long-Term Agreement (LTA) with the EEC which expires at the end of 1987.

France is also demanding that the allocations to SPM vessels in the Gulf be increased to about "half of what the metropolitan vessels had been taking in the Gulf" in addition to average annual catches by SPM vessels over the last five years. This would amount to about 12,000 tonnes, about four times the historical level of activity of the SPM fleet in the area.

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(3) Department of Fisheries and Oceans, News Release, No. NR-HQ-86-92E, 26 November 1986, 3 pages.







## ALLOCATIONS TO FRANCE - 1987

COD	2GH (1) 3200	2J 3KL (2) 1545	3NO (3) 250	3Ps 6400	4RS 3Pn 2300	4T 4Vn 1300	TOTAL 14995
REDFISH				3P 2000	4RST 75	4VWX 500	TOTAL 2575
WITCH				3Ps 410	4RS 75		TOTAL 485
AMERICAN PLAICE			3LNO 610	3Ps 550			TOTAL 1160
FLOUNDER						4VWX 250	TOTAL 250
YELLOW TAIL			3LNO 300				TOTAL 300
SILVER HAKE						4VWX 100	TOTAL 100
SQUID					3 + 4 (3) 2400		TOTAL 2400
TOTAL							22265

- NOTES: (1) This amount includes 200 tonnes allocated to France under the LTA (Long Term Agreement) with the EEC which expires at the end of 1987.
- (2) This amount is allocated to France under the LTA with the EEC.
- (3) These amounts are NAFO allocations.

SOURCE: Department of Fisheries and Oceans

## ALLOCATIONS TO FRANCE - 1986

COD	2GH (1) 200	2J 3KL (2) 1545	3NO (3) 250	3Ps 6400	4RS 3Pn 13500	4T 4Vn 7100	TOTAL 28995
REDFISH				3P 2000	4RST 600	4VWX 500	TOTAL 3100
WITCH				3Ps 410	4RS 300		TOTAL 710
AMERICAN PLAICE			3LNO 700	3Ps 550			TOTAL 1250
FLOUNDER						4VWX 250	TOTAL 250
YELLOW TAIL			3LNO 300				TOTAL 300
SILVER HAKE						4VWX 100	TOTAL 100
SQUID					3 + 4 (3) 2400		TOTAL 2400
TOTAL							37105

NOTES: (1) This amount of 200 tonnes is allocated to France under the LTA (Long Term Agreement) with the EEC which expires at the end of 1987.

(2) This amount is allocated to France under the LTA with the EEC.

(3) These amounts are NAFO allocations.

SOURCE: Department of Fisheries and Oceans



Finally, France is claiming "virtually all the offshore fishing grounds off the southern coast of Newfoundland, extending to almost 200 miles, as the exclusive economic zone for St. Pierre and Miquelon." This means that the Canadian fishermen could lose an additional 41,000 tonnes of cod, in addition to substantial quantities of redfish and various species of flatfish. Canada's position is that "France is not entitled under international law to any maritime zone beyond a territorial sea of 12 miles around the islands." (4)

The total amount of fish in dispute is quite substantial: for example, the amount of cod is approximately 70,500 tonnes. Making allowances for the cod provided to France in 1987, the amount is in the order of 55,500 tonnes. According to the average landed value of this species in 1986, this represents a value of about \$39 million, which can be doubled to nearly \$80 million to give a rough estimate of the market value. The French demands thus represent a threat to the source of a substantial direct income stream (upwards of \$35 million annually) for the 30,000 Canadian fishermen and processing plant workers in the Gulf and the south coast of Newfoundland. (5)

#### D. Recent Developments

In what indicates the substantial hardening of the Canadian position as demanded by various provincial governments and industry participants, Canada, in March 1987, declared the Burgeo bank off limits to French fishing vessels and closed its ports to them in retaliation for France's overfishing its 6,400 tonne quota in Division 3Ps.

In early June, the French government issued two five-year oil exploration permits in the contested zone. This action, which was formally protested by the Canadian government, has been explained both as a means for France to reinforce its claim over the resources of the contested zone, and as retaliation for the earlier closing of Canadian ports to French fishing vessels.

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(4) Ibid.

(5) Gardner Pinfold Consultants, The Canada-France Fisheries Dispute: Implications and Impacts, December 1986.

On 15 June 1987, federal Fisheries Minister Tom Siddon met with his provincial counterparts for two days of discussion, in which the Canada-France fisheries dispute was an important part of the agenda. Through his comments to the press, Newfoundland Fisheries Minister Tom Rideout made it clear that he was satisfied with the positions and strategies devised for the meetings with French officials scheduled for 24 June. This illustrates the close federal-provincial consultation going on in this area to avoid the situation that developed following the signing of the January 1987 agreement, when provincial governments, particularly that of Newfoundland, complained bitterly that they had not been consulted in advance.

However, France cancelled the round of talks scheduled for 24 June, ostensibly to protest the closing of Canadian ports to French fishing vessels.

At the end of August 1987, Canada hosted the International Francophone Summit. This provided the French and Canadian prime ministers with an opportunity to take further steps towards the resolution of the dispute. The Canadian government appointed a lawyer to lead the Canadian negotiating team and the French government agreed to resume negotiations.

The negotiations subsequently resumed on 12 September in Paris with the objective of negotiating French allocations for the period 1988 to 1991. Negotiations were suspended on 14 September, however, with very little progress reported. A further round of negotiations is scheduled for 6 to 8 October in Ottawa when the French will have a new head negotiator as a result of the election of Mr. Guilbert Guillaume to the International Court of Justice at The Hague. The "new" negotiator, Mr. de la Chevallerie, as a former French ambassador to Canada is well acquainted with the pertinent issues.

A stumbling block is that the French wish to have international arbitration on the question of quotas, whereas Canada, wishing to retain control over the allocations of Canadian resources to a foreign country, wants it only for the boundary dispute. Public comments by the former chief of the French negotiating team, Mr. Guilbert Guillaume, suggest France would not wish to pursue the negotiations beyond October, as lack of an agreement by then would demonstrate the inability of the parties



to come to terms. In that case, the French seem to favour the use of the dispute settlement mechanism provided for in the 1972 treaty to settle the question of French allocations. However, because the arbitration phase of the dispute settlement mechanism requires Canada's agreement on the designation of the third expert on the Commission, France needs Canadian assent to act. Furthermore, in seeking such arbitration of its allocations, France has no guarantee of what the decision would be. Therefore, it is questionable whether France really wants this issue to go to arbitration.

The foregoing suggests the possible strategy that Canada use the dispute settlement mechanism of the 1972 Agreement to solve the maritime boundary dispute on the basis that the mutual claims of both countries in the contested zone affect the reciprocal fishing rights of their citizens, as expressed in article 2 of the 1972 Agreement.

An important occurrence during the last round of negotiations was the Newfoundland government's decision to withdraw from the negotiations, in which its representatives, like those of other East Coast provinces, were playing an advisory role only. It may be that the Canadian negotiators, in agreement with Newfoundland representatives, initially attempted to persuade the French to forego their claim to an unspecified amount of 2J3KL cod as promised in the January 1987 agreement, presumably offering alternative allocations, possibly 2GH cod, a surplus stock. On the French refusal of this proposition, the Canadian negotiators may then have offered 1,000 tonnes of 2J3KL cod, an amount deemed insufficient by the French, but which was enough to cause the walkout of the Newfoundland representatives. Apparently reliable press reports state that the Canadian head negotiator was authorized to offer up to 2,000 tonnes. French demands in this area are apparently over 15,000 tonnes, though it is believed that an offer of 9,500 tonnes would be accepted.

Thus the two parties remain far apart. In all likelihood, this is also true with respect to other French allocations such as that to SPM vessels in the Gulf. It should be remembered that the negotiations cover a wide range of French demands and involve the federal government in a delicate balancing act. It must represent and contend with the interests

of fishermen from all provinces concerned yet seek a deal which provides the greatest overall benefit to the Canadian industry.

Crucial from the Canadian government's point of view is the delimitation of the fishing zones of both countries. The Canadian government, through the 1987 Agreement, seeks French agreement to refer the maritime boundary dispute to arbitration in exchange for the negotiation of France's annual allocations from 1988-1991, including an unspecified amount of 203KL cod. The 1987 Agreement substantially reduces the Canadian government's range of manoeuvre in the current negotiations. The "procès verbal" establishing France's allocations from 1988 to 1991 would cover the period of time presumed necessary to settle the question of the maritime boundary. Following the arbitration procedure, the question of French quotas would be re-opened with both countries examining their net gains or losses resulting from the decision. As the Canadian government presumes that it has the most to gain from the arbitration of the boundary dispute, Canada can expect France would increase its demands for allocations after 1991, in compensation for the expected losses, unless of course the arbitration is in France's favour or unless France obtains what it deems a satisfactory response from present discussions.

The federal government's reaction to the Newfoundland government's decision has been uncompromising, maintaining that it will not allow a provincial government to dictate its position on international agreements on subjects clearly within federal jurisdiction.

The recent debate on these issues has unfortunately become very emotional. To put them in perspective we can examine the Canadian government's options, assuming a worst-case scenario. France is currently (in 1987) being allocated 22,265 tonnes by Canada, including 6,400 tonnes in the contested zone where it is known to be fishing at least 26,000 tonnes. France is currently fishing close to 42,000 tonnes in waters off Canada's Atlantic coast of which just under 20,000 are unallocated.

While the 1972 Agreement has been badly criticized, its vagueness as to what French fishing rights actually entail can be used to Canada's advantage. Furthermore, according to Donat Pharand, professor of international law at the University of Ottawa:



If the 1972 Agreement is not explicit as to the right of Canada, to establish quotas unilaterally, it is perhaps because such a right was not yet fully established in international law when the Agreement was negotiated in 1971. It is now recognized, however, that the coastal state has sovereign rights over the exploration, exploitation and management of the biological resources of its exclusive fishing zone.(6)

In the event of a breakdown in the negotiations with France, Canada could reduce France's allocations from 22,265 to 15,310 tonnes in 1988. This would be the result of a reduction of 4,745 tonnes in France's cod allocations from the lapsing of the LTA with the EEC, from the non-renewal of the allocations unilaterally set by Canada in 1987 which offset the effect of the withdrawal of France's metropolitan fleet from the Gulf, together with a reduction in non-NAFO allocations of other species by 50%. This would result in a gain of nearly 7,000 tonnes for Canada.

As a result, France's harvest in the waters off the Atlantic coast would total 41,310 tonnes (15,310 tonnes plus the 26,000 tonnes the French are fishing in the contested zone). This would not represent any major change in the actual level of France's fishing off Canada's Atlantic, but would reduce France's formal allocations in what are indisputed Canadian waters.

In the contested zone, Canada could reduce its harvest to 15,000 tonnes, the difference between the total allowable catch (41,000 tonnes) and the French level of fishing (26,000 tonnes). This would represent a loss of 20,000 tonnes from Canada's current harvesting level of 35,000 tonnes. So far, then, the net loss to Canada of the gains and losses from all above changes could be approximately 13,000 tonnes.

This could, however, be compensated for by further reducing French cod allocation by 7,000 tonnes, so that the French would have only the 1987 level of cod allocation to its SPM vessels and Canada's net loss would be reduced to 6,000 tonnes. This loss could be eliminated by increasing Canada's harvest in the contested zone from the previously

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(6) Donat Pharand, "The Cod War," Policy Options Politiques, September 1987, p. 28-32.

proposed level of 15,000 to 21,000 tonnes. This scenario would result in no net loss to Canada in terms of tonnage and the combined harvests of both countries in the contested zone would total 46,000 tonnes, far less than the currently reported level of 61,000 tonnes, at which there is no immediate threat to the stock.

According to this scenario, Canada would be seen to be fulfilling its obligations, as the French would still be harvesting over 40,000 tonnes in waters Canada deemed to be under its fisheries jurisdiction; this could hardly be interpreted as a denial of France's right to fish in Canadian waters. Canada would also be seen as exercising its right to set quotas unilaterally and as contributing to the conservation of the resource by reducing its own harvest in the contested zone by a net amount of 14,000 tonnes. The onus would then be on France to do likewise.

On the other hand, obviously Canada is under no obligation to change its course of action in the contested zone, thus substantially increasing allocations to Canadian fishermen by an amount equal to the decrease in French allocations in undisputed Canadian waters. In addition, Canada may prefer to maintain its harvesting level in the contested zone as a way of increasing the strength of its claim to the area in an eventual arbitration process. This course of action, however, increases the possibility that France might expand its harvest in the contested zone to compensate for the reduction of its allocations elsewhere in Canadian waters, even at the risk of being accused of irresponsibility in terms of conservation.

In conclusion, it must be said that, while it is in the interest of both countries to seek a negotiated settlement, Canada as a whole has yet to determine what is an acceptable price for such a settlement. Furthermore, before consenting to have France's allocations arbitrated, Canada would presumably have weighed the relative merits of a negotiated settlement and of an arbitrated settlement.

Canada can negotiate from a position of strength by using current French allocations in undisputed Canadian waters as well as continuing to allow Canadian fishermen to operate in the contested zone without any settlement having been reached.



It should be pointed out that the timetable for resolving the various aspects of this dispute through negotiations is less urgent than is suggested by the artificially tight deadlines set for the conclusion of the agreements. The current situation has been in the making for many years. It can be allowed to continue without constituting the immediate major threat to the Atlantic fishery which would result from yielding to French demands in their entirety.







